



February 4, 2020

Via electronic mail

Chairman Frank Pallone, Jr.
Ranking Member Greg Walden
U.S. House of Representatives
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Pallone and Ranking Member Walden,

I submit these comments on behalf of the Appalachian Trail Conservancy (ATC or the Conservancy), the §501(c)(3) nonprofit organization charged under the National Trails System Act and pursuant to a cooperative agreement with the National Park Service to maintain and manage the Appalachian National Scenic Trail (A.T. or Trail). The Conservancy works closely with the 31 Appalachian Trail Maintaining Clubs, the National Park Service, the United States Forest Service, state agencies, and public and private partners to ensure the protection and stewardship of the natural, cultural, and experiential resources of the Trail and its surrounding landscape. The Trail is 2,193 miles and is surrounded by approximately 250,000 acres of federally protected land. I appreciate the opportunity to share our perspective as the manager of a National Scenic Trail, as an organization committed to the protection of Congressionally designated places (specifically the A.T.), and as a representative of the broader outdoor recreation and conservation communities.

The Conservancy is extremely encouraged by both the recently released discussion draft Climate Leadership and Environmental Action for our Nation's future (CLEAN) Act and today's hearing on "Modernizing the Natural Gas Act to Ensure it Works for Everyone." The current draft legislation is a tremendous step forward and we congratulate the Committee and its staff on addressing so many important topics relating to natural gas and energy infrastructure development within the draft.

Over 50 natural gas pipelines cross the Appalachian National Scenic Trail, intersecting the Trail on federal, state, and privately held lands over the course of its 2,193 miles. While the Natural Gas Act (NGA) requires that the Federal Energy Regulatory Commission (FERC) determine whether a gas pipeline is in the public interest, too often, FERC seems to favor expeditious approval rather than the comprehensive review Congress has charged it to pursue. We believe that several processes at FERC could be improved in order to best serve the public interest and appropriately conserve the United States (and individual states') trust resources and bolster the public trust.

Working closely with tribal, state and sibling federal agencies is essential to obtain the best outcome in the siting, permitting, and licensing of energy infrastructure, as is ensuring applicants act in good faith to provide all requested information. In particular, as the Commission continues to review its 1999 Natural Gas Policy Statement and this and other committees consider legislation, the Conservancy hopes that any final decision will reflect the broad needs of producers and consumers, as well as a hard look at the

long-term impacts of energy infrastructure decisions on the natural environment and the conservation of our natural, cultural, historical, and scenic resources. FERC's failure to take a big picture, or even regional market-level, view of natural gas extraction, transportation, and utilization as it processes applications for individual projects is inexcusable and unnecessary.

ATC has worked with pipeline companies, and has recently commented on several pipeline proposals across the A.T. including PennEast, Atlantic Sunrise, Atlantic Coast, and Mountain Valley Pipeline (MVP). In the recent past, we have only formally actively opposed MVP due to poor planning and inadequate environmental review processes as specifically relate to the proposed crossing of the Trail and impact to the natural scenic values protected by Congress via the National Trails System Act (NTSA or Act). Through our programmatic work and advocacy, ATC endeavors to pursue the least disruptive and damaging siting and construction possible for those projects that are proposed to cross the Trail. The necessity of all natural gas pipelines, and the longevity of their utility in the face of climate change and the ever-rapidly improving technology around renewable energy sources, deserves critical evaluation by the Congress. The CLEAN Act would mandate some of what we and our partner conservation and good governance organizations have requested FERC do of its own volition as well as several things we have not previously recommended, but strongly endorse. We outline some of them below.

Recommendations

Our recommendations include the following with justification outlined below:

- The Commission should reform its pipeline review process to ensure that the public interest is protected in a way that recognizes and protects the interests of non-energy related industries that support local economies, as well as energy related industries.
- The Commission should review all necessary and relevant factors to determine public need for a pipeline, as required by the current Policy Statement, rather than simply relying on a predicate agreement to determine market need.
- To determine "necessity," the Commission should adopt a regionally focused review of pipeline development(s).
- The Commission should commit to full and fair implementation of the National Environmental Policy Act.
- The Commission should improve the FERC process for rehearing requests.

Justification

Evaluate public interest and project need.

The outdoor recreation industry's economic reach is massive and its influence continues to grow as more people engage in the outdoors. Increased participation in the outdoors is evident at many national parks, in crowded trailhead parking lots, and in the increasing up-tick of the Appalachian Trail's long-distance hikers. A 2019 report from the U.S. Bureau of Economic Analysis reflects that as of 2017, the

outdoor recreation economy generates \$778 billion in consumer spending annually and directly supports 5.2 million American jobs. Outdoor recreation provides 2.2% of U.S. Gross Domestic Product (GDP), a greater share than mining, utilities, farming and ranching, and chemical products manufacturing. Indeed, according to an Outdoor Industry Association 2017 report, more Americans are directly employed in hunting and fishing industries (483,000) than oil and gas extraction (180,000).

FERC needs to evaluate impact on outdoor recreation and associated economies. One of the most notable outdoor recreation destinations in the eastern United States is the A.T., a day's drive from more than half the U.S. population.

As the nation continues to increase demand for recreation on public lands, gas production and pipeline construction have also increased dramatically since 1999, when FERC established its current policy. The United States is now a net exporter of natural gas. The increased production of gas and associated pipeline development raise concerns about the impacts of the gas industry on public and private recreation lands, as well as on the health, safety, and impact on communities.

ATC recognizes that society's demand for energy resources is increasing. The Conservancy believes that, where technically and economically feasible, demand should first be addressed with increased energy conservation strategies and demand-side management, followed by increasing our renewable energy supply.

The 1999 FERC Policy Statement is meant to create a balance between the enhancement of competitive alternatives and the possibility of over-building pipelines. The NGA requires FERC to determine whether a pipeline project is in the public interest. However, much has changed since 1999 that warrants a more comprehensive analysis of need and an examination of the unintended consequences of over development on other industries, such as outdoor recreation. Particularly as regards several of the pipelines currently approved by FERC to cross the A.T., the "public interest" is represented primarily by precedent agreements that do not reflect anything beyond the agreement to produce and sell natural gas.

The 1999 Policy Statement directs FERC to first determine whether the proposed pipeline can be paid for without subsidization by existing customers, followed by an evaluation of the project's economic interests. The Policy Statement also outlines some factors, but not all factors, to be considered when determining whether a project is needed. However, in practice, FERC typically relies exclusively on precedent agreements—contracts between pipeline developers and prospective shippers—to determine project need. This starting point, rather than a review of the current state of the market and condition and use of potentially impacted resources and communities, is convenient, but not consistent with Congressional directives.

In addition to contradicting the language and intent of the Policy Statement, FERC's reliance on precedent agreements fails to consider that precedent agreements are not necessarily a good proxy for market need. Environmental and other considerations—including the lasting ability to rural communities to make use of intact forest land and clean rivers to attract outdoor recreation visitors—may override private contractual interests in determining public need. There may also be alternatives to proposed capacity to meet demand, such as using underutilized existing pipeline capacity or alternative, cleaner energy resources. Establishing new rights of way for development that could use existing rights of way should also be avoided as possible; chipping away at conserved lands for convenience's sake rather than in order to preserve trust resources is unnecessary and damaging to the public good.

The Commission's heavy reliance on precedent agreements to allow pipeline siting is problematic. When these agreements are between pipeline affiliates, there are obvious conflicts that should be rigorously avoided. When a pipeline developer contracts with itself, the actual market need for the pipeline is never legitimately determined.

Conduct regional planning and assessments.

Recent rapid expansion of natural gas production has led pipeline developers to propose competing projects to satisfy identical markets. For example, numerous pipeline projects that potentially have significant impacts on A.T. recreation lands have been approved or are under review (i.e. Mountain Valley Pipeline, Atlantic Coast Pipeline, WB XPress Project, Appalachian Connector, PennEast Pipeline, Atlantic Sunrise Pipeline). Each of these projects is designed to transport shale gas from the Marcellus and Utica plays to customers in the eastern and southeastern U.S. and each must, in some manner, cross the rugged and ecologically sensitive terrain of the Appalachian Mountains.

When proposed projects have similarities in purpose, similar nature of environmental concerns, and a common timeline among the projects, it makes economic and ecological sense for the FERC to consider pipeline projects under a Programmatic Environmental Impact Statement (PEIS), or some reasonable regional review. This approach would simultaneously consider the purpose and need of each project, the cumulative impacts of these projects in a discrete geographic region, and the optimal combination and alignment of pipelines to deliver gas from the Marcellus and Utica shale gas plays to eastern and southeastern markets.

This approach is consistent with the Council on Environmental Quality (CEQ) Guidance on "Effective use of Programmatic NEPA Reviews" issued on December 18, 2014, which states that a programmatic NEPA review may be appropriate when an agency is approving multiple actions as "...several similar actions or projects in a region."

A Programmatic EIS and tiered NEPA review is clearly the most efficient means by which to conduct cumulative assessments of impacts from a suite of recently proposed projects and from additional pipelines that are a reasonably foreseeable result of the presence of a large reservoir of natural gas in the Marcellus and Utica formations.

As stated in the CEQ Guidance: "One advantage of preparing a programmatic NEPA review for repetitive agency activities is that the programmatic NEPA review can provide a starting point for analyzing direct, indirect, and cumulative impacts. Using programmatic NEPA reviews allows an agency to better analyze proposal specific issues and avoid repetitive broad level analyses. Better analyses of proposal specific issues would provide a more comprehensive picture of the consequences of proposed actions."

Better analysis of pipeline alignments would also better support other NEPA evaluations such as those conducted by the U.S. Forest Service, whose National Forest land and resource management plan for special use authorizations and utility corridors directs that projects be located "where they minimize the need for *additional* designated sites and best serve their intended purpose." Policy requires joint use on land when feasible.

Of significant note, the 1999 Policy Statement's intent in preventing overbuilding is inadequately addressed by FERC's lack of regionally focused reviews. This lack of regionally focused review also

results in a wasteful duplication of agency employee staff time (as well as stakeholder staff time) and infrastructure projects that are poorly balanced with regional needs and other planning initiatives. Considering each pipeline proposal in isolation also prevents the Commission from understanding how similar proposals cumulatively affect climate change, natural resources, and consumer prices. A more integrated, comprehensive review process would better assess the need for new pipelines based on the energy needs of the region(s) directly affected by the project by examining factors such as existing and proposed pipeline capacity, long-term energy needs, and state energy policies.

Consider cumulative impacts of foreseeable actions.

As stated in 40 C.F.R. §1508.7, “cumulative impacts result from the incremental effect of the action when considered in light of other past, present, and reasonably foreseeable actions.” Consideration of cumulative impacts is necessary for the avoidance, minimization, and fair compensation for impacts that individually may appear to be minor but, over time and in concert with other activities, become significant. Accordingly, FERC should cumulatively assess all proposed pipeline projects within the same region when determining the need for any one specific project in that region.

Scientifically tested tools (such as the Social Cost of Carbon and the Social Cost of Methane) exist today that allow the Commission to monetize environmental impacts and incorporate them into a review analysis. FERC can satisfy its requirements under the National Environmental Policy Act (NEPA) by using modern analytical tools to consider all direct, indirect, and cumulative environmental impacts, including downstream effects.

Particularly given the scientifically indisputable impacts of climate change, including, but not limited to, extreme weather, increased flooding, extended dry/fire seasons, and shrinking habitat for wildlife, FERC should stop necessarily associating “public convenience” with “public necessity.” It is past time for FERC to approve necessary and not simply convenient projects.

Improve process for rehearing requests.

FERC must end its practice of failing to affirmatively grant or deny rehearing requests, but instead issue responses that provide FERC more time for consideration. Although the NGA requires the agency to issue a decision on appeals within 30 days, FERC can extend the deadline to ensure for the submission and consideration of critical information by issuing a tolling order. Tolling orders are officially an order granting rehearing for further consideration. In some recent cases, FERC issued its decision after the pipes were already in the ground with the gas flowing. The current process grants the pipeline company the power of eminent domain and approval for construction while valid lawsuits are being considered by the courts. There should be a limit on how much time FERC takes to resolve pipeline cases.

Commit to full and fair implementation of the National Environmental Policy Act (NEPA).

With over 50 pipelines crossing the A.T., the Conservancy has broad experience working with developers for the best possible pipeline, in part because FERC does not seem capable of critically evaluating what the best route and construction method for a pipeline may be if it’s not what’s included in the application.

FERC must improve its transparency in the NEPA review process by ensuring *meaningful* opportunities for public participation and by presenting complete and accurate draft environmental impact statements

for public review. It is unacceptable to have reams of information presented after public comment periods have ended and to expect to legitimately factor into the public's ability to fully review and comment on proposed actions. Unfortunately, this was the case with FERC's public review process for the Mountain Valley Pipeline (MVP).

ATC, and many local stakeholders, were shocked and dismayed by the enormous number of disorganized filings that the developer, MVP, was permitted to add after the public review process had concluded. Thousands of pages from MVP were added to FERC's website, without notice to other stakeholders, title and without indexing, rendering them impossible to fully understand. Moreover, MVP was allowed to continue to file documents after the Final Environmental Impact Statement (FEIS) was issued.

It is imperative that FERC adhere to NEPA processes. It is also imperative that filings are available to the public and agencies in a way that fully represents the project to assure meaningful commentary in the Draft Environmental Impact Statement (DEIS) process. An orderly labeling of filings is necessary so that affected agencies, organizations and individuals can review, monitor and track changes.

In addition to inexcusable disorganization outlined above, FERC must be mindful—and guard against—the suppression of public discourse. In the case of MVP hearings, a hearing November 3, 2016 in Roanoke, Virginia required citizens to go into a room alone with a FERC representative and a transcriber—which, in itself, is a practice to be discouraged. Public hearings typically allow the public to participate in public process—and provide assurance that comments are not manipulated. While FERC representatives may be used to such meetings, they could be intimidating for those who are not frequently engaged in conversations with governmental entities considering divesting them of their lands or livelihood. In the case of the Roanoke hearing, the public was not only disallowed opportunity to comment before their neighbors, the transcripts were not released for several weeks, questioning the integrity of the transcripts.

Additionally, because the public participation provisions of NEPA include public comment on all federal and federally directed state actions (i.e. permits), a FERC Certificate of Public Convenience or Necessity Notice to Proceed regarding any aspect of construction, (including tree felling, approval for exercise of eminent domain, etc.) should only be issued after all federal, state, local and other permits are obtained. This recommendation should apply to conditional FERC certificates as well. The Conservancy is therefore gratified that CLEAN Act prohibits “quick take.”

What may be necessary in order to ensure the proper consideration of public need is some kind of public advocate located within FERC. ATC is extremely encouraged to see the CLEAN Act contain H.R. 3240, the Public Engagement at FERC Act, sponsored by Energy and Commerce Member Janice Shakowsky and co-sponsored by Energy and Commerce Members Anne Lane Kuster and Patrick Kennedy III (both members of the House A.T. Caucus). In our experience, FERC has not been as engaged in thoughtfully considering the impact of proposed (and ultimately developed) infrastructure on the communities through which the infrastructure passes. Unfortunately, it often seems as though FERC is unable to appreciate that while the development of some infrastructure is in the public good, the manner in which the infrastructure is developed is critical. Too often does FERC appear to conflate a project application's detailing of desired siting and construction technique as a detailing of the greater good itself.

Local communities seeking to preserve their community, culture, and the natural and scenic values they prize and take pride in are often shut out of participating substantively in the evaluation process, while

developers seem to have access and forgiveness in meeting deadlines available to no one else. No one should feel that without ATC, one of our partners, or independent counsel, that they must beg developers to let them hold onto some part of the legacy handed to them by their predecessors and which they had hoped to leave to their children. Establishing a Public Engagement Office at FERC will hopefully enable the public to have the ability to truly influence decision-making at FERC in a way that sees its needs, rather than the desires of natural gas producers, take greater precedence.

Conclusion

The Appalachian Trail Conservancy thanks the Committee for considering its perspective regarding FERC's current Natural Gas Policy and strongly recommends that processes for siting natural gas pipelines be vastly improved to assure that decision-making is open, fair and transparent. Passage and enactment of the CLEAN Act would facilitate substantial improvements at FERC. As the Committee considers this and related legislation, it is important that it weighs heavily the importance of FERC in pursuing a holistic approach to evaluating pipeline applications. If you have any questions or would like further information, I welcome the opportunity to meet to discuss our comments, especially given unique considerations for the Appalachian National Scenic Trail and the high demand for new pipeline, transmission lines, and related energy infrastructure within the 14 states through which the Trail passes.

Sincerely,



Brendan Mysliwec
Director of Federal Policy and Legislation
Appalachian Trail Conservancy